IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 4124 of 1999

For Approval and Signature:

Hon'ble MR.JUSTICE D.H.WAGHELA Sd/-

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

1 & 2 YES; to 5 NO

KANTILAL BHOVANBHAI BUTANI

Versus

UNION OF INDIA

Appearance:

MR AMAR D MITHANI for Petitioner

MR MUKESH R SHAH for Respondent No. 1

RULE SERVED for Respondent No. 2, 3, 4

CORAM : MR.JUSTICE D.H.WAGHELA

Date of decision: 28/09/2000

C.A.V. JUDGEMENT

1. The petitioner, a workman, challenges the decision of the appropriate Government refusing to refer the industrial dispute and prays a direction to refer the

dispute to the appropriate forum under the Industrial Disputes Act, 1947 (the 'Act').

2. The relevant facts can be summarised as follows: The petitioner was temporarily employed for 178 days to work on the post of Branch Post Master, Banduri from January 1990 to December 1995 when the regular incumbant was not available. In 1994 when the post of Branch Post Master had fallen vacant and his name was recommended by the employment exchange to the Superintendent of Post Offices, Junagadh, the Superintendent of Post Offices required the petitioner to apply in the prescribed form with necessary certificates for the post. The petitioner accordingly complied. Out of the applications received, the Department short-listed the candidates for interviews. The petitioner was called for the interview and on being selected, was posted as the Branch Post Master, Banduri in place of one Smt.D.M.Pandya from 20.12.1995. However, the Superintendent of Post Offices, by his memo dated 18.1.1996, imposed a stipulation that as Smt.D.M.Pandya had been put "off duty" pending finalisation of disciplinary proceedings and judicial proceedings against her, the need had arisen and the provisional appointment to the post would last till the aforesaid proceedings were disposed of and she had exhausted all channels of departmental and judicial appeals and petition etc. It was also stipulated in the memo that in case it was finally decided not to take Smt.D.M.Pandya back into service, the appointment of the petitioner would continue till regular appointment was made and that the petitioner should clearly understand that if ever it was decided to reinstate Smt. D.M.Pandya in service, his provisional appointment would be terminated without notice and also at any time before that event without assigning any reason. The petitioner was required to sign the duplicate copy of the memo in token of having accepted the conditions. According to the petitioner, during the period of his satisfactory service, some formalities were initiated for regularisation of his service, but by the order dated 9.12.1996, he was asked to hand over the charge of his post to Smt. D.M.Pandya who came to be reinstated in service by the D.P.S., Rajkot. Thereafter, order terminating the services of the petitioner was passed on 17.12.1996. According to the petitioner, Smt. D.M.Pandya continued to remain absent time and again and ultimately resigned from service on 18.10.1997. Thereafter, without considering the claim and entitlement of the petitioner, the Superintendent of Post Offices, Junagadh appointed one Dipak M. Gondalia, who is the son of a sub-post master at the nearby Malia-Hatina post

office. On 5.11.1997, the name of the petitioner was again recommended by the employment exchange for the post of Branch Post Master at Banduri and pursuant to it, he was called for interview. However, without the petitioner being asked a single question at the interview, a person with lower educational qualification and without any relevant experience came to be appointed on extraneous consideration, according to the petitioner.

2.1 The petitioner approached the Assistant Labour Commissioner (Central) under the Industrial Disputes Act, 1947, whose conciliation proceedings ended in failure. The failure report forwarded by the Conciliation Officer took note of the stipulations relating to the appointment of the petitioner and conveyed that the demands of the workman for reinstatement with continuity of service with full backwages was not considered by the management. Referring to the failure report dated 28.12.1998, the impugned order of the Government of India, Ministry of Labour, refusing to refer the dispute was communicated by letter dated 16.2.1999, the material part of which reads as under:

> ".....that prima facie this Ministry does not consider this dispute fit for the following reasons.
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> It is found that the workman was engaged as Extra-Department Branch Post Master in stop-gap arrangement and accepted the employment as per the conditions of employment which clearly stipulates that whenever the regular B.P.M. namely Smt. D.B.Pandya is reinstated, the services of Sh. Butani will be terminated without notice. Hence the dispute did not subsist.
>
> (K.V.B.UNNY)
> UNDER SECRETARY"

3. The impugned order is challenged mainly on the ground that the authority has exceeded its jurisdiction in deciding the dispute on merits and refusing to refer it to the appropriate forum. It is also alleged that the decision not to refer the dispute was bad on the ground that there was non-application of mind. It is submitted that the authority of the appropriate Government in the matter of referring or refusing to refer an industrial dispute was restricted to deciding whether there existed a dispute which was required to be adjudicated by the industrial forum. It is further submitted that the

substantive right of a workman to approach the appropriate forum under the Industrial Disputes Act and the substantive provisions of the Industrial Disputes Act, such as, Sections 25-B, 25-F, 25-G, 25-H etc. would become redundant if the appropriate Government itself decides the dispute and refuses to refer the same.

4. Several precedents have been relied upon on behalf of the petitioner to submit that the Government cannot by itself render a decision on the merits of the dispute on a failure report submitted by the Conciliation Officer [KRISHNA G. NAIK BORKAR v. KADAMBA TRANSPORT COIRPORATION LTD. 1993-III-LLJ (Suppl.) 22]; that the Government has no jurisdiction to go into the merits of the case and adjudicate the same, which jurisdiction is vested by law in the Industrial Tribunal [DINA NAIK v. KADAMBA TRANSPORT CORPORATION LTD. 1995-III-LLJ (Suppl.) 13]; that the Government cannot delve into merits of the dispute and take upon itself determination of the 'lis' which falls within the exclusive jurisdiction of Labour Court/ Industrial Tribunal [MALLESHA P. v. UNION OF INDIA 1999-II-LLJ 423]; that the formation of opinion as to whether an industrial dispute exists or is apprehended is not the same thing as to adjudicate the dispute itself on its merits [TELCO CONVOY DRIVERS MAZDOOR SANGH v. STATE OF BIHAR 1989-II-LLJ 558]. It is submitted that the power to make a reference conferred upon the Government to effectuate the object of the enactment is not unguided, and the rule is to make a reference, unless the same is ex facie frivolous; that the Government is conferred with the power to refer the dispute and not to decide it [THE RAJASTHAN STATE ROAD TRANSPORT CORPORATION v. KRISHNA KANT 1995-II-LLJ 728]; that the right of a workman to get the matter determined by the Tribunal cannot be taken away by the State under the garb of applying its mind for referring the disputes [AZAD KUMAR C/O LABOUR UNION FARIDABAD v. THE STATE OF BIHAR 1996-II-LLJ 143]; that the discretion of the Government to make a reference or not is not arbitrary and in appropriate cases if the Government chooses not to make a reference, a direction could be issued under Article 226 by the High Courts [JITENDRA NATH BISWAS v. M/S. EMPIRE OF INDIA AND CEYLONE TEA CO. AIR 1990 SC 255]. Relying upon the judgment of the Hon'ble Supreme Court in RAM AVTAR SHARMA v. STATE OF HARYANA [AIR 1985 SC 915], it is further submitted that if the Government performs an administrative act while either making or refusing to make a reference under Section 10 (1), it cannot delve into the merits of the dispute and take upon itself the determination of the lis which would amount to exceeding the power conferred by Section 10. The appropriate

Government is required to determine as to whether an industrial dispute exists or the claim is frivolous. Even such administrative determination must be based on grounds relevant and germane to the exercise of power. If the administrative determination is based on grounds irrelevant, extraneous or not germane to the exercise of power, it would be subject to judicial review. It is thus submitted that the appropriate Government has, by refusing to refer the dispute, in effect, decided and accepted the legality of the termination of the petitioner's service and arbitrarily denied him recourse to the forum prescribed by law, thereby exercising jurisdiction not vested in it.

5. The learned counsel for the respondent sought to justify and defend the conclusion reached by the Government and relied upon the two recent judgments of the Hon'ble Supreme Court. In THE NEDUNGADI BANK LTD. v. K.P.MADHAVANKUTTY [2000 AIR SCW 397], the Apex Court has, in the case of a complaint made after a lapse of seven years, taken the view that the power under Section 10 of the Act is to be exercised reasonably and in a rational manner. It was held that when the demand raised by the respondent for raising an industrial dispute was ex facie bad and incompetent, it could not be said that industrial dispute did arise or was even apprehended after lapse of seven years of the dismissal of the respondent. The Central Government lacked the power to make reference both on the ground of delay in invoking the power under Section 10 of the Act and there being no industrial dispute existing or even apprehended. It was however held that an administrative order which does not take into consideration statutory requirements or travels outside that was certainly subject to judicial review, limited though it might be. The Supreme Court quoted with approval the observations as under in NATIONAL ENGINEERING INDUSTRIES LTD. v. STATE OF RAJASTHAN [1999 AIR SCW 4626]:

> "If there is no industrial dispute in existence or apprehended, the appropriate Government lacks power to make any reference".

5.1 THE SECRETARY, INDIAN TEA ASSOCIATION v. AJIT KUMAR BARAT [2000 AIR SCW 507] is the other judgment relied upon on behalf of the respondents. In that case, an order directing the State Government to make a reference under the Industrial Disputes Act was confirmed by the High Court in its appellate jurisdiction and came to be challenged before the Apex Court. The law on the point is briefly summarised as under:

"1. The appropriate Government would not be justified in making a reference under S.10 of the Act without satisfying itself on the facts and circumstances brought to its notice that an industrial dispute exists or apprehended and if such a reference is made, it is desirable wherever possible, for the government to indicate the nature of dispute in the order of reference;

2. The order of the appropriate Government making a reference under S.10 of the Act is an administrative order and not a judicial or quasi-judicial one and the Court, therefore, cannot canvass the order of the reference closely to see if there was any material before the Government to support its conclusion, as if it was a judicial or quasi-judicial order;

3. An order made by the appropriate government under S.10 of the Act being an administrative order, no lis is involved, as such an order is made on the subjective satisfaction of the Government;

4. If it appears from the reasons given that the appropriate government took into account any consideration irrelevant or foreign material, the Court may in a given case consider the case for a writ of mandamus and;

5. It would, however, be open to party to show that what was referred by the Government was not an industrial dispute within the meaning of the Act."

Then, after referring to the impugned order of the State Government, it was found by the Supreme Court that the State Government had rightly formed the opinion that the respondent No.1 was not a workman. It was held that the administrative order was passed by the State Government after taking into consideration the material available on record and it could not be faulted; and that it did not take into consideration any irrelevant or foreign material. It is, therefore, submitted that considering the relevant and undisputable material on record, the Government had, in the facts of this case, rightly come to the conclusion that no industrial dispute subsisted, and such decision could not be faulted.

6. Looking to the Scheme of the Industrial Disputes

Act, by its very preamble, the Act is intended to provide for investigation and settlement of industrial disputes. The definition of the phrase "industrial dispute" is very wide and it includes any dispute or difference between employers and workmen which is connected with the employment or non-employment or the terms of employment or with the conditions of employment of any person. The Act provides for constitution of several authorities, the procedure to be followed by them and their powers and duties. Several substantive provisions, besides the provisions for the investigation and settlement, as well as compulsory adjudication of industrial disputes, are engrafted in the Act to confer rights and create liabilities particularly in the events of individual or mass termination or suspension of services by way of retrenchment, lay-off, lock-out, closure, strike etc. However, such additional substantive provisions do not derogate from the basic purpose and function of the Act, which is to provide for the investigation and settlement of industrial disputes. It is in this larger context that the power to refer or not to refer an industrial dispute ought to be viewed keeping in mind the relevant provisions and the conspectus of legal dicta in the form of several judgments referred hereinabove.

6.1 The relevant statutory provisions of the I.D.Act read as under:

"10. Reference of disputes to Boards, Courts or Tribunals -

(1) Where the appropriate Government is of opinion that any industrial dispute exists or is apprehended, it may at any time, by order in writing,-

(a) refer the dispute to a Board for promoting a settlement thereof; or

(b) refer any matter appearing to be connected with or relevant to the dispute to a Court for inquiry; or

(c) refer the dispute or any matter appearing to be connected with, or relevant to, the dispute, if it relates to any matter specified in the Second Schedule, to a Labour Court for adjudication; or

(d) refer the dispute or any matter appearing to be connected with, or relevant to, the

dispute, whether it relates to any matter specified in the Second Schedule or the Third Schedule, to a Tribunal for adjudication:

Provided that where the dispute relates to any matter specified in the Third Schedule and is not likely to affect more than one hundred workmen, the appropriate Government may, if it so thinks fit, make the reference to a Labour Court under clause (c):

Provided further that where the dispute relates to a public utility service and a notice under Section 22 has been given, the appropriate Government shall, unless it considers that the notice has been frivolously or vexatiously given or that it would be inexpedient so to do, make a reference under this sub-section notwithstanding that any other proceedings under this Act in respect of the dispute may have commenced:

Provided also that where the dispute in relation to which the Central Government is the appropriate Government, it shall be competent for that Government to refer the dispute to a Labour Court or an Industrial Tribunal, as the case may be, constituted by the State Government.

(1-A) to (8) ... ...

12. Duties of conciliation officers:-

(1) Where any industrial dispute exists or is apprehended, the conciliation officer may, or where the dispute relates to a public utility service and a notice under Section 22 has been given, shall, hold conciliation proceedings in the prescribed manner.

(2) The conciliation officer shall, for the purpose of bringing about a settlement of the dispute, without delay, investigate the dispute and all matters affecting the merits and the right settlement thereof and may do all such things as he thinks fit for the purpose of inducing the parties to come to a fair and amicable settlement of the dispute.

(3) If a settlement of the dispute or of any of the matters in dispute is arrived at in the course of the conciliation proceedings, the

conciliation officer shall sent a report thereof to the appropriate Government or an officer authorised in this behalf by the appropriate Government together with a memorandum of the settlement signed by the parties to the dispute.

(4) If no such settlement is arrived at, the conciliation officer shall, as soon as practicable after the close of the investigation, send to the appropriate Government a full report setting forth the steps taken by him for ascertaining the facts and circumstances relating to the dispute and for bringing about a settlement thereof, together with a full statement of such facts and circumstances, and the reasons on account of which, in his opinion, a settlement could not be arrived at.

(5) If, on a consideration of the report referred to in sub-section (4), the appropriate Government is satisfied that there is a case for reference to a Board, Labour Court, Tribunal or National Tribunal, it may make such reference. Where the appropriate Government does not make such a reference it shall record and communicate to the parties concerned its reasons therefor.

(6) ....."

7. It is clear that the decision of the Government to refer or not to refer a dispute is an administrative function. The Government is required to satisfy itself on the facts and circumstances brought to its notice that an industrial dispute exists or is apprehended. As no lis is involved in the making of such administrative order, it is based on the subjective satisfaction of the Government. However, such orders are subject to judicial review and if it appears from the reasons required to be given for refusing to refer a dispute that the Government took into account any consideration which was irrelevant or foreign material, the Court may, in a given case, issue a writ of mandamus. As held by the Hon'ble Supreme Court in JITENDRA NATH BISWAS v. M/S.EMPIRE OF INDIA AND CEYLONE TEA CO. (AIR 1990 SC 255), a prima facie examination of the merits cannot be said to be foreign to the enquiry which the appropriate Government is entitled to make in dealing with a dispute under Section 10 (1). However, as also held by the Hon'ble Supreme Court in TELCO CONVOY DRIVERS MAZDOOR SANGH v. STATE OF BIHAR [1989-II-LLJ 558], the formation of opinion as to

whether an industrial dispute 'exists or is apprehended' is not the same thing as to adjudicate the dispute itself on its merits and in performing the administrative function, the Government cannot delve into the merits of the dispute and take upon itself the determination of the lis. It is also observed by Their Lordships in the same judgment that "there may be exceptional cases in which the State Government may, on a proper examination of the demand, come to a conclusion that the demands are either perverse or frivolous and do not merit a reference. Further, the Government should be very slow to attempt an examination of the demand with a view to declining reference and Courts will always be vigilant whenever the Government attempts to usurp the powers of the Tribunal for adjudication of the valid disputes, and to allow the Government to do so would be to render Section 10 and Section 12 (5) of the Act nugatory."

8. As can be seen from the impugned order in this case, the Government has concluded that the dispute did not subsist and that is the reason for refusing to refer the dispute. The fundamental fallacy lurking in the impugned order is that under the guise of deciding whether a dispute exists or not, the appropriate Government has gone into and decided the root cause of the dispute as to the validity of the termination of service. The question whether the termination of service of the workman was legal may incidentally arise for adjudication by the industrial forum while deciding the industrial dispute arising from the demand of the workman for reinstatement with full backwages. The phrase "industrial dispute" is defined under Section 2 (k) of the Act which reads as under:

> "2 (k) 'industrial dispute' means any dispute or difference between employers and employers, or between employees and workmen, or between workmen and workmen, which is connected with the employment or non-employment or the terms of employment or with the conditions of labour, of any person."

Thus, according to the definition of the phrase "industrial dispute" in Section 2 (k) of the Act, it, inter alia, means any dispute or difference between the employer and the employee which is connected with employment or non-employment or the terms and conditions of employment of any person. Where a demand is raised for reinstatement by a workman upon termination of his service and any dispute or difference arises between that workman and his employer in connection with termination,

that would be deemed to be an "industrial dispute" by virtue of the provisions of Section 2-A of the Act, which reads as under:

> "2-A: Dismissal, etc., of an indidivual workman to be deemed to be an industrial dispute- Where any employer discharges, dismisses, retrenches or otherwise terminates the services of an individual workman, any dispute or difference between that workman and his employer connected with, or arising out of, such discharge, dismissal, retrenchment or termination shall be deemed to be an industrial dispute notwithstanding that no other workman nor any union of workmen is a party to the dispute."

Thus, any dispute or difference between the employer and the employee -collectively or individually- which is connected with or arises out of not only retrenchment but discharge, dismissal or termination of service would by a deeming fiction be an "industrial dispute". Ordinarily, unless such dispute is resolved by a settlement during the course of or outside conciliation, it subsists. It follows that where the workman has raised and pursued a demand pursuant to the termination of his service and the same is not resolved during conciliation or otherwise within the statutory scheme, it would be factually incorrect to state that an industrial dispute did not exist or subsist. The considerations as to whether the termination from which the dispute arose was legal and proper are irrelevant and not germane to deciding whether the industrial dispute exists. In the facts of the present case, the Government has taken into account the nature and conditions of employment of the petitioner and found the termination to be in terms of a stipulation in that behalf and held that the dispute did not subsist. The ascertainment of existence or subsistence of an industrial dispute did not depend upon the validity of termination because that itself was the matter involved in the dispute.

9. In the circumstances and for the reasons discussed hereinabove, it is held that the reasons of non-subsistence of dispute given by the Government in the impugned order for refusing to refer the dispute are based on consideration of the conditions of service of the petitioner and the validity of termination of his service which were not relevant and germane for ascertaining whether there was a dispute which was required to be referred for adjudication.

10. The petition is therefore allowed and the impugned order dated 16.2.1999 of the Government is hereby set aside and the Government is directed to reconsider the matter of referring the dispute of the petitioner for adjudication and make a fresh order in accordance with the provisions of the I.D.Act and in light of the observations made in this judgment within six weeks of the receipt of the writ of this order. Rule is made absolute accordingly with no order as to costs.

Sd/-

[D.H.WAGHELA, J.]

(KMG Thilake)

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